

# Examining the GOP's class action reform plan

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Currently gaining traction in the Senate is the Fairness in Class Action Litigation Act of 2017, which passed the U.S. House of Representatives on March 9 by a vote of 220-201.

But how significant is the bill? And how does it differ from the framework established by Federal Rule of Civil Procedure 23 and the Class Action Fairness Act of 2005?

Early commentators have come out on both sides, some praising the act's attempts to cut down on meritless litigation driven only by plaintiffs' attorneys and third-party funders, others viewing the new restrictions as a boon to defendants.

Regardless of how the act is characterized, it seems clear that its many proposed changes could significantly alter the way class actions proceed in the federal court system.

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## SUBSTANTIVE CHANGES

The bill imports three new substantive requirements, all of which would force putative class plaintiffs to make greater legal and factual showings at earlier points in the litigation. Although the additional requirements would reduce the number of cases proceeding as class actions, they could also lead to a temporary increase in litigation from parties debating their precise meaning.

### *Same 'type and scope' of injury*

First, the act would require lead plaintiffs to establish before class certification that each member of the proposed class suffered the same type and scope of injury.

Currently, a class can be certified even if some members have suffered no injury, based on the idea that it is possible to resolve injury-related differences at the damages stage of the case instead of prior to certification.

The rule has allowed "no injury" class members to proliferate, increasing the plaintiffs' negotiating leverage and then undeservingly reaping the benefits of large settlements.

That often occurs in suits over consumer products, which can involve thousands of uninjured customers with buyer's remorse. One empirical study found that no-injury class actions have resulted in \$4 billion worth of settlements and judgments over the last decade alone.<sup>1</sup>

The new requirement would especially impact securities fraud cases, which can involve investor losses ranging from a few hundred dollars (for individuals) to hundreds of millions (for institutional investors).

Product liability claims would also become more difficult to certify, especially those focusing on pharmaceuticals, because injuries often vary dramatically across class members.

### *Reliable and feasible method of distribution*

The act's next substantive change is its requirement that class representatives demonstrate a reliable and administratively feasible method for both identifying class members and "for distributing ... any monetary relief" to them directly.

Some circuits already apply a similar standard for identifying class members, a doctrine known as "ascertainability." The proposed change would require the rest to join them.

The additional distribution requirement would likely reduce the number of cases allowed to proceed on a class-wide basis.

### *Evidentiary burden for personal injury MDLs*

The bill's third main substantive change is its new evidentiary burden for personal injury plaintiffs seeking to join multidistrict class actions.

Such plaintiffs would have 45 days to establish that they were at least exposed to the defendant's alleged injury-causing conduct, even if it would be premature at that stage to demand proof of an actual injury.

If that initial evidentiary showing was insufficient, the plaintiff have 30 days to amend it.

## PROCEDURAL CHANGES

On top of those substantive changes, the bill introduces new procedural requirements that could be a mixed bag for plaintiffs and defendants: Some make class actions less appealing for plaintiffs' attorneys, but others might make their jobs easier.

### **Automatic discovery stay**

The act would automatically stay all discovery and other proceedings during the pendency of a motion to transfer, motion to strike class allegations, or other motions to dispose of the class allegations “unless ... particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.”

The Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. § 78u-4, contains the same exception to its automatic stay, and courts would likely borrow from the PSLRA’s case law in deciding whether and when to allow discovery.

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The act would make class certification decisions automatically appealable, eliminating the discretion enjoyed by federal appeals courts.

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This change would be a boon for defendants, since discovery is often one of the priciest parts of defending against a class action. A stay would allow defendants to delay those costs until after any motion to dismiss is resolved.

### **Proportional attorney fees**

Attorney fees are usually calculated using either the lodestar method, which involves multiplying a reasonable number of hours worked by a reasonable hourly rate, or according to a percentage of the class’ recovery, usually 20 to 33 percent.

The bill would require that fees be proportional to the recovery, effectively eliminating the lodestar method. It would also require courts to calculate class counsel’s cut only based on the amounts actually paid to class members, not just the theoretical maximum approved by the court.

Such a limitation on attorney fees will likely deter many so-called strike suits, meritless cases filed by plaintiffs hoping to extort a quick settlement based on the thread of a drawn-out litigation.

### **Automatic certification appeal**

As it stands, Rule 23(f) allows an interlocutory, or immediate, appeal of class certification orders, but only at an appellate court’s discretion. Courts across the country have applied the rule inconsistently.

The act would make the right to appeal automatic, meaning parties would have the ability to challenge either the grant or the denial of class certification without needing to show why.

The change would eliminate some of the current system’s inefficiencies by allowing courts and litigants to delay the expensive enterprise of notifying class members and preparing for trial until they are certain they have to.

But it would likely also increase the number of appeals from both sides, slowing down the overall class-action process.

### **DISCLOSURE CHANGES:**

The act would impose several new disclosure requirements that have never before been mandatory across the board, in all cases and jurisdictions.

#### **Settlement data**

The bill would require disclosure to Congress — before the disbursement of attorney fees — of information about all settlements involving the resolution of a dispute over class-wide monetary damages.

Required in the disclosure would be the total and average amounts paid, the highest and lowest amounts paid, the estimated number of class members, and the purpose of the payments.

The data would go to congressional judiciary committees, which could use it as an empirical basis for future class-action legislation.

#### **Third-party funding disclosure**

Under the proposed law, class counsel would also have to disclose any third party that has a contingent right to receive compensation from any settlement or judgment.

The requirement is aimed at allowing more transparency about who is really the driving force behind a given case. The provision will likely lead the growing “third-party funding” industry to oppose the bill.

#### **Class counsel conflicts of interest**

Finally, the act would require the complaint to disclose whether any proposed class representative or named plaintiff is related to class counsel, has ever been employed by class counsel, has previously been a client, or has any other contractual relationship with class counsel. If any of those relationships exist, the court must deny class certification.

The requirement is meant to prevent plaintiffs’ attorneys from recruiting individuals to serve as plaintiffs in meritless suits.

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But plaintiff firms that specialize on particular areas may be able to work around the proposed rule by banding together to share clients. And an amendment has already been proposed that would exempt institutional investors, which frequently take a lead role in securities class actions, and their lawyers.

Defendants already frequently challenge class actions based on those types of conflicts, usually by arguing that the lead plaintiffs are inadequate or atypical class representatives. Formalizing the requirement would save them, and courts, the trouble.

## NOTES

<sup>1</sup> Joanna Shepherd, *An Empirical Survey of No-Injury Class Actions* (Feb. 4, 2016), Emory Legal Studies Research Paper No. 16-402, <http://bit.ly/2rV5RKu>.

## ABOUT THE AUTHORS



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